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No. 05-595

FILED
JUL 19 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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July 19, 2006

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QUESTIONS PRESENTED

I. WHETHER THIS COURT'S DECISION IN *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004) APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW UNDER THE STANDARD OF *TEAGUE V. LANE*, 489 U.S. 288 (1989).

II. WHETHER 28 U.S.C. § 2254 (d) ADOPTS THE EXCEPTIONS TO RETROACTIVITY UNDER *TEAGUE V. LANE*, 489 U.S. 288 (1989), FOR PRIVATE CONDUCT BEYOND CRIMINAL PROSCRIPTION, AND WATERSHED RULES.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The order denying the Director's petition for rehearing en banc (Joint Appendix 213) (hereinafter "JA") is reported at 418 F.3d 1055. The order amending the opinion of the Ninth Circuit (JA 211) is reported at 408 F.3d 1127. The original opinion of the Ninth Circuit (JA 116) is reported at 399 F.3d 1010. The order of the Ninth Circuit directing the parties to file simultaneous briefs (JA 85) is unreported. The opinion of the district court (JA 61) is unpublished.

JURISDICTIONAL STATEMENT

The original judgment of the court of appeals reversing the judgment of the district court and granting the Respondent's petition for writ of habeas corpus was entered on February 22, 2005. The court of appeals entered an order amending the original decision on June 1, 2005. The Court of Appeals denied the Director's petition for rehearing en banc, with nine judges dissenting, on August 11, 2005. The Director filed his petition for writ of certiorari on November 7, 2005, within ninety (90) days after the denial of the petition for rehearing en banc. Sup. Ct. Rule 13(3). The petition for writ of certiorari was granted on May 15, 2006. The Director invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

2. Section 1 of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

3. 28 U.S.C. § 2254(d) provides:

   (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. In January, 1988, Marvin Bockting had moved to Las Vegas, Nevada, and was living in a motel with his wife, Laura, his six-year-old step daughter, Autumn, and a three-year-old child that the couple had in common. JA 62. Bockting worked as a handyman at various jobs during the day and cared for children at night while Laura attended business college. JA 46. On Saturday night, January 16, 1988, when Bockting was absent from the residence, Autumn woke up frightened and sobbing. JA 46, 62. Autumn eventually told her mother about Bockting's sexual attacks upon her. JA 46-47, 57. Autumn was reluctant to reveal the incidents because Bockting had previously threatened her that he would "beat her butt" and that "mom would make dad leave." JA 46-47, 57.

Autumn told her mother that Bockting had repeatedly put his "pee-pee in her pee-pee," that he put his "pee-pee in her butt," that he made her "suck his pee-pee like a sucker," until "white bubbly stuff" came out and went into her mouth, and that "he put his chin on her pee-pee." JA 47, at n.1, 56. Autumn's mother thereafter confronted Bockting and made him leave. JA 57. As Bockting was leaving the residence, Autumn wanted to hug and kiss him. JA 57.

On Tuesday, January 19, 1988, Laura took Autumn to the hospital where a gynecologist and obstetrician examined her under general anesthesia. JA 57. That examination revealed a recent tear in the rectal sphincter and a wide opening in the hymenal ring. JA 47. The examining doctor testified at trial that the injuries were consistent with an application of "blunt force" trauma. JA 62. The doctor also testified that the rectal injury had occurred within the last week. JA 63. Bockting had been the only male around Autumn during that prior week. JA 63, 58 at n.8.

Detective Zinovitch of the Las Vegas Metropolitan Police Department attempted to interview Autumn at the hospital. JA 47. However, Autumn was visibly distraught and was only able to say that someone had hurt her. JA 47. Several days later in a recorded interview, Detective Zinovich again met with Autumn and was able to effectively interview her. JA 47, 56. Autumn relayed the same information that she had previously revealed to her mother. JA 47, 55. Autumn also demonstrated the incidents to Detective Zinovich through the use of anatomically correct dolls. JA 48, 55. When using the dolls, Autumn demonstrated positions that would have been necessary for the acts to take place between a large adult male and a small female child. JA 48, 56. Autumn also explained how she held onto the sink while Bockting pressed against her "real hard" from behind when describing the act of anal intercourse. JA 56. Bockting was later arrested and charged with four counts of sexual assault on a minor under fourteen years of age. JA 45, 48.

At the preliminary hearing, the prosecutor questioned Autumn about the incidents of sexual abuse. JA 8-9. The child was able to answer questions about the difference between the truth and a lie, but became very upset when questioned about being touched by Bockting. JA 8-9, 14-21,

119-20. Autumn initially stated that Bockting touched her in a way he should not. JA 14. However, she eventually stated that she could not remember how Bockting touched her. JA 16, 48. Although she could remember talking to her mother and the detective, she could not remember what she had told them. JA 16-17, 48. The court asked Laura Bockting to comfort her daughter at the stand in an effort to enable her to respond to the questioning. JA 18, 48. That effort failed, and the judge declared the child an unavailable witness. JA 22, 48-49. The defense did not have an opportunity to cross-examine the child. JA 63, 120. Based upon the testimony of Laura Bockting and Detective Zinovitch, however, Bockting was bound over to stand trial in the district court. JA 120.

2. On August 15, 1988, Bockting's trial commenced in the Eighth Judicial District Court of Nevada. JA 63. When Autumn was called to testify at trial, she became very distraught and the court ruled that she was an unavailable witness. JA 24-25, 49, 63. The State sought to have Autumn's hearsay statements made to her mother and Detective Zinovitch admitted under Section 51.385 of the Nevada Revised Statutes, allowing hearsay testimony for an unavailable witness. JA 49. After an evidentiary hearing, the district court ruled in favor of the prosecution, but also ruled that the defense could present to the jury Autumn's testimony that was presented at the preliminary hearing. JA 63. The three-day jury trial resulted in a guilty verdict against Bockting on three counts of sexual assault on a minor under the age of fourteen. JA 63-64. The trial court sentenced Bockting to serve two consecutive life sentences with the possibility of parole and a concurrent life sentence with the possibility of parole. JA 63-64.

Bockting appealed his conviction to the Nevada Supreme Court, where he first alleged that his constitutional right to

confront adverse witnesses had been denied. JA 41-42, 64. Bockting argued that he was denied his right to cross-examine his stepdaughter because unreliable hearsay statements attributed to the victim were admitted into evidence pursuant to NRS 51.385. JA 42. On June 22, 1989, the Nevada Supreme Court concluded that Bockting's appeal had no merit and dismissed the appeal. JA 41-42.

Bockting then applied to the United States Supreme Court for a writ of certiorari. On June 28, 1990, The United States Supreme Court issued an opinion vacating the Nevada Supreme Court's Order Dismissing Appeal that was filed on June 22, 1989. JA 44. The matter was remanded back to the Nevada Supreme Court for consideration in light of *Idaho v. Wright*, 497 U.S. 805 (1990). JA 44. On March 8, 1993, the Nevada Supreme Court issued its lengthy and reasoned Opinion affirming Bockting's conviction. JA 45-60.

On March 30, 1994, Bockting filed a proper person Petition for Post-Conviction Relief in the Eighth Judicial District Court. JA 64. That matter was finally disposed of on December 24, 1997, when the Nevada Supreme Court filed its Order Dismissing Appeal, upholding the lower court's order denying the petition. JA 64-65.

3. Bockting then turned to the federal courts, seeking habeas corpus relief pursuant to 28 U.S.C. §2254. Among other claims not at issue here, Bockting alleged in Ground 1 that his rights under the Confrontation Clause had been violated by the admission of the victim's hearsay statements. JA 65. The district court ultimately denied Bockting's petition, holding that the Nevada Supreme Court's post-remand decision was neither contrary to, or involved an unreasonable application of, clearly established federal law. JA 61-84.

On April 26, 2002, the district court issued a certificate of appealability on Bockting's Confrontation Clause claim.

4. After oral argument before a three judge panel in the Ninth Circuit Court of Appeals, but prior to the rendering of a decision, this Court issued its decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The Ninth Circuit then requested supplemental briefing with respect to whether the *Crawford* decision should apply retroactively to this case and specifically to the resolution of the Confrontation Clause issue. JA 85-86. Shortly thereafter, a deeply divided panel issued an opinion holding that *Crawford* applies retroactively under *Teague v. Lane,* 489 U.S. 288 (1989), and granting the petition for a writ of habeas corpus. JA 116-77.

The two judges in the majority applied different reasoning. Judge McKeown concluded that *Crawford* announced a new rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), because it "disavow[ed]" the test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980). She further concluded, however, that *Crawford* fits within the second *Teague* exception for bedrock rules of criminal procedure. Judge McKeown reasoned that "the purpose of the Confrontation Clause is to promote accuracy" and that "it is no leap to conclude that the right to cross-examination as an adjunct to the constitutional right to confrontation joins the very limited company of *Gideon [v. Wainwright*, 372 U.S. 335 (1963)]," which is the paradigmatic example of a bedrock rule of criminal procedure falling within the second exception. JA 132.

Judge McKeown further ruled that habeas relief may be granted even though 28 U.S.C. § 2254(d) authorizes federal courts to grant such relief only when the state court decision was either "contrary to, or involved an unreasonable

application of, clearly established Federal law." She reasoned that this Court has impliedly held that Congress intended AEDPA "to adopt the *Teague* exceptions" and that, "even if Congress' intent is unclear, the constitutional doubt canon of construction mandates that we read the statute to incorporate the *Teague* exceptions to avoid the serious constitutional problem raised by depriving individuals of bedrock principles of Due Process." JA 136. She went on to conclude that the Nevada Supreme Court's decision—which followed this Court's express directive on remand to apply *Idaho v. Wright*, 497 U.S. 805 (1990)—was contrary to "established Supreme Court precedent in *Crawford*, as made retroactive under *Teague* and *Summerlin*." JA 136.

Finally, citing to *Neder v. United States*, 527 U.S. 1 (1999), Judge McKeown concluded that the admission of the hearsay statements was not harmless beyond a reasonable doubt. JA 137.

Judge Noonan's concurrence created the necessary majority and agreed with the conclusion that *Crawford* applies retroactively but found that it is not a "new rule" within the meaning of *Teague*. JA 138-39. Instead, *Crawford* corrected a misinterpretation of a prior rule. "A change in rationale is not treated by the Supreme Court as a change in rules...All along, the bedrock was there." JA 141 (citations omitted). Judge Noonan stated his support of the *Crawford* rule as it should apply to this case. According to Judge Noonan, the six-year-old victim dreamed up the sexual attacks and then felt compelled to repeat these statements to the detective in a "psychological compulsion to not let her mother down." JA 139. Judge Noonan's suspect view of the evidence supported his belief of how wise it is to exclude testimony that is unsupported by cross-examination. JA 139-40. He

concluded by stating that, in the alternative, he concurred in Judge McKeown's analysis and opinion. JA 140-41.

Judge Wallace dissented. He had little difficulty concluding that *Crawford* announced a new rule, observing that, before *Crawford*, courts could admit hearsay evidence against a criminal defendant whenever the defendant was unavailable and the evidence had "adequate indicia of reliability." JA 144 (quoting *Roberts*, 448 U.S. at 66). *Crawford* "emphatically rejected *Roberts's* approach to testimonial evidence" and "replaced *Roberts* with a new test that has two requirements: 'unavailability and a prior opportunity for cross-examination.'" JA 144 (quoting *Crawford*, 124 S. Ct. at 1374).

Judge Wallace then concluded that the second *Teague* exception does not apply, emphasizing that the standard, under this Court's recent decision in *Schriro v. Summerlin*, 124 S. Ct. 2519, 2525 (2004), is whether the prior procedural rule "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." JA 147 (internal quotation marks and citation omitted). Judge Wallace concluded that the admission of "testimony which has been judicially determined to bear 'adequate indicia of reliability' (as *Roberts* required), but which has not necessarily been subjected to cross-examination (as *Crawford* requires)" does not "'so seriously diminish[] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach.'" JA 148 (quoting *Summerlin*, 124 S. Ct. at 2525).

5. The Ninth Circuit panel subsequently amended its original decision, noting that it had applied the wrong standard for harmless error analysis. JA 211-12 The panel instead applied the standard for harmless error under *Brecht*

v. Abrahamson, 507 U.S. 619 (1993), to determine whether the admission of Autumn's statement "had substantial and injurious effect or influence in determining the jury's verdict." JA 211-12. Without explanation, the panel was again skeptical that Laura Bockting's testimony was admissible, but dismissed it as "weak." JA 212. Without discussing the corroborating physical evidence, the panel focused instead on the child-victim's inconsistent statements made at the preliminary hearing. JA 211-12. Based upon those two factors, the panel believed that the detective's statements were so significant as corroborating evidence that its admission had a substantial and injurious effect on the jury's verdict. JA 212. Therefore, the admission of the child's statements did not constitute harmless error. JA 212.

6. Nine judges dissented from the denial of the Director's petition for rehearing en banc. JA 213-24. Judge O'Scannlain, writing for the dissenting judges, agreed with Judge Wallace's reasoning and expressed several additional objections to the majority's holding. The dissent stated that "*Crawford* hardly bears comparison with *Gideon*," pointing out that *Crawford* did not establish *ex nihilo* the right to confrontation, as *Gideon* established the right to counsel; it merely reshaped the contours of that right." JA 215. The dissent noted that "*Crawford's* rule resembles nothing so much as the *last* new rule we held to apply retroactively, only to be quickly reversed by the Supreme Court" in *Schriro v. Summerlin*. JA 220.

The dissent further pointed out that "every other circuit to have considered the question"—including two since the date of the panel's original decision—has reached the contrary conclusion. JA 222-23. Finally, the nine dissenting judges noted that the court's holding "will have serious consequences" for "it will open the door for a slew of habeas

petitions (and, for federal prisoners, motions under 28 U.S.C. § 2255) from prisoners whose convictions were based, even partially, on out-of-court testimonial statements." JA 223.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in holding that this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) applied retroactively to Respondent Bockting's collateral habeas case, under the standards set forth in *Teague v. Lane*, 489 U.S. 288 (1989). *Crawford* overturned the earlier rule in *Ohio v. Roberts*, 448 U.S. 56 (1980) which permitted the admission of hearsay evidence at trial if the evidence bore particularized indicia of reliability, and replaced that rule with one which requires that testimonial hearsay evidence be inadmissible unless there was a prior opportunity for cross-examination. The Ninth Circuit correctly noted that the *Crawford* rule was a new procedural rule, but mistakenly held that it fell under the *Teague* exception to the presumption of nonretroactivity because it established a watershed rule on par with the rule of *Gideon v. Wainwright* 372 U.S. 335 (1963). The holding that *Crawford* established a watershed rule was erroneous because the *Crawford* rule does not meet the standards of the *Teague* exception. The new rule of *Crawford* is not one without which the likelihood of an accurate conviction is seriously diminished, and it is not a sweeping new rule reflecting a procedure that is implicit in the concept of ordered liberty. The Ninth circuit stands alone in its conclusion that *Crawford* is retroactive, as six other circuit courts, and numerous state appellate courts, have held that it is not.

The Ninth Circuit reached its singularly anomalous conclusion that *Crawford* should receive retroactive application by engaging in two analytical errors. First, the

court focused on the wrong issue, concentrating its analysis on the general right to confrontation rather than the specific rule in *Crawford*. Second, the court thereafter proceeded to apply an improper, watered-down standard to the question of whether the *Crawford* rule was a watershed rule by substantially reducing the standard for accuracy, and by defining the bedrock prong of the test in terms of the accuracy prong, thereby excising the second prong from the standard. By misfocusing its analysis and then applying an erroneous standard to the inquiry, the Ninth Circuit reached the wrong conclusion. The circuit court erred further in finding that the A.E.D.P.A. amendments of 1996 (Antiterrorism and Effective Death Penalty Act), specifically 28 U.S.C. § 2254 (d)(1) and (2) codified the *Teague* exception for watershed rules, when it found that the Nevada Supreme Court's 1993 decision in Bockting's remanded direct appeal was contrary to or involved an unreasonable application of clearly established federal law as determined by this Court eleven years later in *Crawford*.

ARGUMENT

I. THE NINTH CIRCUIT'S RULING THAT *CRAWFORD* APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW VIOLATES THIS COURT'S RULING IN *TEAGUE V. LANE*, 489 U.S. 288 (1989).

A. *Teague* and its progeny create a strong presumption that new procedural rules generally do not apply retroactively to cases on collateral review.

In *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, this Court held that, in most instances, new rules do not apply

retroactively to cases on collateral review. When a decision of this Court announces a new rule, that rule applies to all criminal cases still pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328, (1987); *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). As to cases that have become final, a new rule will apply only in limited circumstances. A new *substantive* rule will generally apply retroactively to cases on collateral review. *Bousley v. United States*, 523 U.S. 614, 620-21 (1998).[1] Substantive rules are those that alter the scope of criminal liability for an offense. Substantive new rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal, or faces a punishment that the law cannot impose on him." *Summerlin*, 542 U.S. at 348, 352 (internal quotations omitted).

New rules of *procedure*, however, generally do not apply retroactively, as they do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise, a more "speculative connection to innocence." *Summerlin*, 542 U.S. at 352. Because of this more speculative connection to innocence, this Court gives

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[1] New substantive rules which place particular conduct or persons covered by the statute beyond the State's power to punish them have sometimes been referred to as an exception to the *Teague* bar to retroactivity. This Court in *Summerlin* referred to them as substantive rules not subject to the bar. *Summerlin*, 542 U.S. at 352, n. 4. "Rules that fall within what we have referred to as *Teague's* first exception 'are more accurately characterized as substantive rules not subject to [*Teague's*] bar." *Beard v. Banks*, 542 U.S. 406, 411, n. 3 (2004).

retroactive effect "to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.*, citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

It is not enough that a new procedural rule is "fundamental" in some abstract sense. New procedural rules will be given retroactive effect in a collateral proceeding only when the two elements of *Teague's* second exception are present: (1) the new procedural rule must be one without which the likelihood of an accurate conviction is *seriously* diminished, *Summerlin*, 542 U.S. at 352; and (2) it must be one that alters our understanding of the bedrock procedural elements essential to the fairness of the proceeding. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). The Court has held that the pre-*Teague* rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963), guaranteeing a criminal defendant the right to counsel at trial is a rule that would satisfy this exceedingly high standard. *Beard v. Banks*, 542 U.S. 406, 417 (2004). No other new rule has ever been cited as an example of one reaching this unique status. Other important new rules, such as, *inter alia*, the right to a jury trial in serious state criminal cases, have been found to be *non-retroactive* to cases on collateral review. *See Summerlin*, 542 U.S. at 356-57.

The Court has described the second *Teague* exception as applying only to a "small core of rules requiring observance of those procedures that...are implicit in the concept of ordered liberty." *Beard*, 542 U.S. at 417. It is not enough that a new rule may be described as being "sweeping and fundamental". *Beard*, 542 U.S. at 418. More is required. The Court has repeatedly noted that this class of new procedural rules is extremely narrow, and has recently found that "it is unlikely that any...'ha[s] yet to emerge.'" *Summerlin*, 542 U.S. at 352, citing *Tyler v. Cain*, 533 U.S.

656, 667 n.7 (2001); *accord, Sawyer v. Smith*, 497 U.S. at 243.

Since *Teague* in 1989, no new rule has been found by this Court to be retroactive, despite the Court's having considered the application of at least twelve new procedural rules. See *infra*, at 31, et seq. Moreover, a growing number of circuit courts of appeal, now numbering six, have held that *Crawford* is not retroactive. *Lave v. Dretke*, 444 F.3d 333 (5th Cir. 2006); *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004); *Bintz v. Bertrand*, 403 F.3d 859 (7th Cir. 2005); *Dorchy v. Jones*, 398 F.3d 783 (6th Cir. 2005); *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004); *Espy v. Massac*, 443 F.3d 1362 (11th Cir. 2006).[2] The two circuit courts that considered the retroactivity of *Crawford* after the Ninth Circuit's *Bockting* decision explicitly rejected that court's holding. *Espy*, 443 F.3d at 1367; *Lave*, 444 F.3d. at 336. "The two judge *Bockting* majority thus stands alone in its conviction that *Crawford* applied retroactively." JA 223 (O'Scannlain, J. dissenting).

The Ninth Circuit's rationale for finding *Crawford* retroactive is unsound. The Ninth Circuit engaged in

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[2] In addition, an ever expanding number of State appellate courts have held that *Crawford* is not retroactive to cases on collateral review: *Drach v. Bruce*, ___ P. 3d ___, (Kan. 2006); *Edwards v. People*, 129 P.3d 977 (Colo. 2006); *Chandler v. Crosby*, 916 So. 2d 728 (Fla. 2005); *In re Moore*, ___ Cal. Rptr. ___, (Cal. App., 4th Dist., Div. 1 2005); *Danforth v. State*, 700 N.W. 2d 530 (Minn. App. 2005); *In re Markel*, 154 Wash. 2d 262, 111 P.3d 249 (2005); *State v. Williams*, 695 N.W. 2d 23 (Iowa 2005); *People v. Edwards*, 101 P.3d 1118 (Colo. App. 2004); *but see, State v. Forbes*, 119 P.3d 144 (N.M. 2005) (retroactive under "unique facts and procedural posture").

numerous analytical errors in reaching its conclusions about *Crawford's* retroactivity. The court applied an improperly diluted standard for watershed rules, and in so doing it misconceived and misapplied both the accuracy prong and the bedrock principle prong of *Teague's* second exception. The court confused and conflated the role of a new rule in the *Teague* analysis with the wholly distinct underlying fundamental right the new rule was crafted to support. The circuit court's lengthy and largely irrelevant discussion of the Confrontation Clause in general, to the exclusion of any meaningful analysis of the *Crawford* rule, allowed the court to misdirect its focus on inapplicable externalities. Finally, the circuit court misconceived and misstated the constitutional purpose behind the *Crawford* rule, and disregarded the role that harmless error plays in Confrontation Clause trial error. These errors led the Ninth Circuit to veer off course in its analysis of the retroactivity question, and to erroneously conclude that *Crawford* stated a watershed rule that is retroactive. These errors led the court to grant Bockting habeas corpus relief.

B. *Crawford* Announced A New Procedural Rule.

When an inmate raises a claim in a collateral proceeding that implicates *Teague*, the first foundational task is to determine whether the relief sought would create, or would require the retroactive application of, a "new rule" for purposes of *Teague*. *Sawyer*, 497 U.S. at 233. A case announces a new rule when it "breaks new ground or imposes a new obligation on the States or the Federal Government": a case announces a "new rule" of constitutional law if the result "was not *dictated* by precedent existing at the time defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis in original); *see also Saffle*, 494 U.S. at 488.

Crawford constitutes a new rule, as it definitively changed the process for deciding when, and whether, hearsay testimony is admissible, shifting the factfinding process from a judge to the jury. To constitute a new rule, the superseding rule need not amount to a radical departure from its predecessor. This Court has held that it is enough if the new rule amounts to a "modification" of the former rule. For example, in analyzing the *Batson* rule in *Teague*, the Court made the observation that, in setting forth a more detailed process for challenging a prosecutor's peremptory challenges at trial, it "modified" its earlier decision, yet still held it was a new rule. *Compare Batson v. Kentucky*, 476 U.S. 79 (1986) *with Swain v. Alabama*, 380 U.S. 202 (1965). *Batson* certainly did not change the underlying Equal Protection principle of *Swain*, or the constitutional policy behind the general rule. What changed with *Batson* was the *mechanics* of the showing required to state such a claim before the trial court. The *Crawford* rule represents at least as great a departure from existing law than that illustrated by *Batson*, because *Crawford* established a new process for finding testimonial hearsay evidence reliable by shifting the inquiry from sufficient indicia of reliability to the opportunity for prior cross-examination. *Crawford* therefore represents a change in the existing law at least as significant as the then-new *Batson* rule, and, likewise, stands as a new rule.

The *Crawford* Court itself described its decision as revising existing law to reflect more accurately the original understanding of the Confrontation Clause. In so doing, it explicitly rejected the "particularized guarantees of trustworthiness" test of *Roberts* and its progeny:

> *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees

> of trustworthiness.' 448 U.S., at 66, 100 S.Ct. 2531. This test departs from the historical principles identified above in two respects. First, it is too broad: it applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: it admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations...The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one...

Crawford, 541 U.S. at 60-62.

These words stand as a break from the *Roberts* rule. The Court rejected the "open-ended balancing test" it had applied in *Roberts* and replaced it with a "categorical constitutional guarantee" that the Court ruled was constitutionally prescribed. *Crawford*, 541 U.S. at 67. The Court expressly elected to overrule *Roberts*, instead of following it by simply reweighing its reliability factors and finding that the particular evidence at issue fell short. *Crawford*, 541 U.S. at 66-67. Clearly, a decision announces a new rule if it expressly overrules a prior decision. *Graham v. Collins*, 506 U.S. 461, 467 (1993). Under these principles, *Crawford* announced a "new rule" within the meaning of *Teague*. Indeed, the concurring Justices in *Crawford* characterized the opinion as a "new rule" that overruled *Roberts*. *Crawford*, 541 U.S. at

75 (Rehnquist, C.J. and O'Connor, J. concurring in the judgment).

Not surprisingly, all of the circuit courts that have addressed the issue have concluded that *Crawford* crafted a new rule for *Teague* purposes. See JA 132 (McKeown, J.); JA 153 (Wallace, J., dissenting); *Brown*, 381 F.3d at 1226; *Bintz*, 403 F.3d at 866; *Dorchy* 398 F.3d at 788; *Espy*, 443 F.3d at 1366.

Further, the new rule of *Crawford* is a *procedural* rule. This Court held in *Summerlin* that:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. See, *Bousley, supra*, at 620-621,118 S.Ct. 1604 (rule 'hold[s] that a ...statute does not reach certain conduct' or make[s] conduct criminal'); *Saffle, supra*, at 495, 110 S.Ct. 1257 (rule 'decriminalize[s] a class of conduct [or] prohibit[s] the imposition of...punishment on a particular class of persons'). In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural. See *Bousley, supra*, at 620, 118 S.Ct. 1604.

Summerlin, 542 U.S. at 353. This Court in *Summerlin*, then, utilized a functional test to determine whether a new rule is procedural: those that regulate the *manner* of determining the defendant's culpability are procedural. This characterization succinctly and precisely describes the operation of the *Crawford* rule. *Crawford* does not articulate any prohibition on the power of a criminal law-making authority to proscribe individual conduct, does not decriminalize a class of conduct, and does not prohibit the imposition of punishment on a

particular class of persons. *See*, *Summerlin*, 542 U.S. at 353. Rather, *Crawford* regulates the manner in which evidentiary reliability is determined within the context of testimonial hearsay evidence—requiring the opportunity for prior cross-examination, rather than sufficient indicia of reliability. Because *Crawford* regulates the manner of admissibility of certain evidence, and does not alter the range of conduct or the class of persons that the law punishes, it is a procedural rule.

C. *Crawford* did not state a watershed rule under *Teague v. Lane*, 489 U.S . 288 (1989).

1. The two conjunctive prongs of the watershed standard from *Desist* and *Mackey* must be fully and independently analyzed.

The Ninth Circuit erred in granting habeas corpus relief to Bockting by holding that the *Crawford* rule should be retroactively applied to his collateral case on the ground that it created a watershed rule. The rule of *Crawford*, while important, is not a watershed rule. *Crawford* overturned the *Roberts* procedure of allowing a judge to determine the reliability of an out-of-court statement, and replaced it with the rule that testimonial hearsay is admissible only if the declarant is unavailable to testify, and the defendant has had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 64-67. This new rule is neither one without which the likelihood of an accurate conviction is seriously diminished, nor one that alters our understanding of the bedrock procedural elements essential to the fairness of the proceeding.

Crawford was based on the Court's determination that the Confrontation Clause reflects a "judgment, not only about the

desirability of reliable evidence...but about how reliability can best be determined", labeling judicial findings of reliability in the hearsay context as "surrogate" to the framers' intent. *Crawford*, 541 U.S. at 61-62. The rule of *Crawford* "renegotiat[ed] the boundaries between admissible and inadmissible evidence", where this Court "endeavored to reinstitute 'the constitutionally prescribed method of assessing reliability.'" JA 146 (Wallace, J., dissenting). In shifting the locus of reliability determinations from sufficient indicia of reliability to the opportunity for prior cross-examination, *Crawford* "reshaped the contours" of the long-established right to confrontation. JA 215 (O'Scannlain, J., dissenting). This reshaping neither created a new rule without which the likelihood of an accurate conviction is seriously diminished, nor a new rule rising to the level of a sweeping bedrock rule that is implicit in the concept of ordered liberty on par with *Gideon*.

All of the circuit courts that have considered the issue of the retroactivity of *Crawford*, save for the Ninth Circuit, have held that it was not retroactive. The Ninth Circuit was able to deviate from the unanimity of other circuits' holdings because it applied a watered-down standard to the question of retroactivity. The erroneous standard applied by the Ninth Circuit allowed the court to draw faulty conclusions about both of the *Teague* second exception prongs, accuracy and bedrock character of the new rule.

As set forth above, this Court has made it abundantly clear that to fall within the second *Teague* "watershed" exception, a new rule must meet two requirements: infringement of the rule must (1) seriously diminish the likelihood of obtaining an accurate conviction, and (2) it must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Tyler v. Cain*, 533

U.S. 656, 665 (2001) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990), and *Teague*, 489 U.S. at 311). To achieve watershed status, a new rule must be as "sweeping" and fundamentally groundbreaking, that is, core to the criminal process, as the right to counsel created in *Gideon*. *Saffle*, 494 U.S. at 495. *See*, *Beard*, 542 U.S. at 418; *O'Dell*, 521 U.S. at 167.

The Court has, in the past, rebuffed inmates' attempts to reduce the standard of the second *Teague* exception, and the Court has steadfastly held to the position that the high standard set forth in *Teague*, drawn from both *Desist v. United States,* 394 U.S. 244 (1969) and *Mackey v. United States,* 401 U.S. 667 (1971), remains in full force. The argument that a watered-down showing focusing only on generic accuracy should be sufficient to define watershed rules was soundly rejected by this Court in *Sawyer*, 497 U.S. at 242-43. The inmate in *Sawyer* argued that the second *Teague* exception should apply to new capital sentencing rules that "preserve the accuracy and fairness of capital sentencing judgments." *Sawyer*, 497 U.S. at 242. The Court rejected this attempt to dilute the standard, and held that the definition of watershed rules continues to include *both* of its constituent components from *Desist* and *Mackey*:

> In *Teague* we modified Justice Harlan's test to combine the accuracy element of the *Desist* test with the *Mackey* limitation of the exception to watershed rules of fundamental fairness. *It is thus not enough under Teague to say that a new rule is aimed at improving the accuracy of trial. More is required.* A rule that qualifies under this exception must not only improve accuracy, but also ' alter our understanding of the bedrock procedural elements' essential to the

> fairness of a proceeding. *Teague*, supra, 489 U.S., at 311, 109 S.Ct., at 1076...

Sawyer, 497 U.S. at 242 (emphasis added). The Court rejected the attempt to reduce the *Teague* standard by finding that "[a]cceptance of petitioner's argument would return the second exception to the broad definition that Justice Harlan first proposed in *Desist*, but later abandoned in *Mackey*...". *Sawyer*, 497 U.S. at 242.

The Ninth Circuit found that *Crawford* was retroactive because it applied an analytical process that was virtually identical to that rejected by this Court in *Sawyer*, by applying a watered-down standard to the question of whether the *Crawford* rule was a watershed rule. The application of a faulty standard led the circuit court to grant relief to Bockting.

2. The rule announced in *Crawford* does not satisfy the accuracy prong of the watershed definition.

a. The *Crawford* rule is not one without which the likelihood of an accurate conviction is seriously diminished. While cross-examination may be seen as a tool or procedure for determining the reliability of testimony in criminal trials, *Crawford*, 541 U.S. at 61-62, this Court recognized in *Crawford* that confrontation does not necessarily result in any increased accuracy at all, and that hoped-for increased accuracy was *not* the basis for the decision:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in

> a particular *manner*: by testing in the crucible of cross-examination."

Id. at 61. According to this Court, then, it was not an assurance of increased reliability that served as the driving force behind *Crawford*; rather it was fidelity to the historically correct constitutional *process*: that reliability be assessed in a particular *manner*, that the confrontation process follow the procedural rules established by the Founders.

Indeed, in many cases *Crawford* will work to *diminish* accuracy, because *Crawford* will, in some cases, bar the admission of highly reliable evidence that would have been admitted under *Roberts*. As the Second Circuit noted in *Mungo*:

> As we see the operation of the *Crawford* rule, it is likely to improve accuracy in some circumstances and diminish it in others. To the extent that *Crawford* requires the exclusion of unreliable hearsay that would have been admitted under the prior law, it is likely to improve accuracy. . . . At the same time, however, *Crawford* also precludes admission of highly reliable testimonial out-of-court statements that would have been admissible under the old rules. In such instances, juries will be deprived of highly reliable evidence of guilt, and cases that otherwise would have resulted in well-deserved convictions will now result in acquittals or hung juries. We recognize that *Crawford's* rule derives from the principle that cross-examination is a better engine of truth-determination than a judge's assessment of the reliability of uncross-examined hearsay. *Crawford*, 124 S.Ct. at 1370. We do not question this principle. But it does not necessarily follow that the *Crawford* rule will improve

> the accuracy of the process. For the requirement of cross examination will, in cases where the declarant is not available to be called for cross-examination, simply result in the exclusion of the testimony altogether. Where testimony was admissible under the old rules precisely because it was reliable, these applications of *Crawford* will diminish, rather than increase, the accuracy of the process.

Mungo, 393 F.3d at 335. *Accord*, *Bintz*, 403 F.3d at 867.

These conclusions have been strengthened by the Court's recent decision in *Davis v. Washington*, ___ U.S. ___, 126 S.Ct. 2266 (2006), explicitly limiting *Crawford* to testimonial evidence. *Davis* instructs that non-testimonial evidence, whether reliable or not, is simply beyond the reach of the Confrontation Clause. This bolsters the conclusion that *Crawford*'s contribution to accuracy overall is small. (Indeed, because non-testimonial hearsay evidence of questionable reliability that would have been excluded under *Roberts* will not excluded under *Crawford* and *Davis*, the *Crawford* decision may have the effect of reducing accuracy.)

b. In reaching the opposite conclusion on the accuracy prong, the Ninth Circuit panel made a series of errors. Foremost among them, the Ninth Circuit conflated two fundamentally distinct principles—the court conflated the new rule of *Crawford* with the underlying right of confrontation on which that new rule was based. See JA 128 (explaining that confrontation, *in general*, was designed to "promote" and to "augment" accuracy in the factfinding process). In essence, the circuit court focused it analysis solely on the benefits of confrontation *in general*, rather than on the operation of the *Crawford* rule specifically. This confusion of the new rule

with the underlying right allowed the court to draw erroneous conclusions about the new rule's effect on accuracy.

There is no doubt, and the Petitioner does not dispute the conclusion, that confrontation, as a general proposition, benefits accuracy in factfinding. But the general benefits of confrontation are not at issue in this case, and the circuit court asked the wrong question. As pertains to the first prong of the watershed standard, the relevant inquiry is not whether confrontation, in general, is beneficial, or whether confrontation is a fundamental right; the only relevant question is much narrower: whether infringement of the *Crawford* rule seriously diminishes the likelihood of obtaining an accurate conviction (along with the second relevant inquiry, whether the rule alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding). *Tyler*, 533 U.S. at 665.

This Court has never equated a new rule with the relevant underlying right on which the rule was premised in conducting a *Teague* analysis. Just the opposite is true. New rules invariably are premised on important, fundamental rights, yet none has been held to be retroactive. Likewise, new rules also invariably have some benefit to fact-finding accuracy, and yet this Court has found that no new rule can compare with *Gideon*.

Many new rules that implicate fundamental rights of defendants, such as due process or the Eighth Amendment, and that were designed to augment accuracy in fact-finding, have been held to be non-retroactive. For example, in *Lambrix v. Singletary*, 520 U.S. 518 (1997), the Court held that the accuracy-enhancing rule of *Espinoza v. Florida*, 505 U.S. 1079 (1992) was not retroactive (new rule held that vague "wicked, evil, atrocious, or cruel" aggravating factor

in shared jury/judge determination of capital sentence violated prohibition against aggravators that fail to provide jury with direction as to what it must find in order to impose death sentence). Likewise, in *O'Dell v. Netherland*, 521 U.S. 151 (1997), the court held that the accuracy-enhancing rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994) was not retroactive (new rule held that capital jury could not base sentencing determination on possibly false belief about defendant's future custody status). In *Sawyer v. Smith*, 497 U.S. 227 (1990), the Court held that the accuracy-enhancing rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) was not retroactive (new rule held that capital jury could not base sentencing determination on false belief that appellate court held responsibility for sentence). In drawing conclusions about the accuracy prong, the Ninth Circuit's focused its analysis on the wrong target.

The Ninth Circuit's second core error was in misstating the effect on accuracy that the new rule must have, and thereby reducing the *Teague* standard even further. The panel simply held that, for *Teague* purposes, accuracy enhancement is enough: "The Supreme Court has repeatedly and without deviation held that the purpose of the Confrontation Clause is to promote accuracy..." JA 128. This view of the *Teague* standard grossly understates the accuracy element. Under this reduced standard, any new rule that enhances accuracy might well qualify for watershed status; yet no such new rule ever has.

As the dissent below noted, however, "the question is whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is 'one without which the likelihood of an accurate conviction is *seriously* diminished.' *Summerlin*, ___ U.S. ___, 124 S.Ct. at 2523 (internal quotation marks

omitted)." JA 149-50 (Wallace, J., dissenting). Had the majority applied the *Teague* analysis as this Court has many times, it would have reached the conclusion of every other court that found that *Crawford* was not retroactive.

3. The rule announced in *Crawford* does not satisfy the bedrock prong of the watershed definition.

As noted earlier, to meet the watershed exception, a new rule must be as "sweeping" and fundamentally groundbreaking as the right to counsel established in *Gideon*. A comparison of *Crawford* to *Gideon*, and to the many new rules that this Court has found not to be watershed, confirms that *Crawford* belongs in the non-watershed camp. In holding that *Crawford* was a watershed rule, the Ninth Circuit committed multiple errors.

a. The *Crawford* rule differs substantially from *Gideon* in its scope, breadth, character, and operation. *Crawford* is considerably narrower, substantially less of a departure from existing law, and has far less impact on factfinding accuracy overall. Moreover, *Crawford* cannot begin to approach *Gideon's* core, bedrock, and fundamental procedural character in guaranteeing fairness in the criminal process.

The *Crawford* rule modified the then-existing regime for finding testimonial hearsay evidence admissible within the narrow confines of testimonial hearsay evidence. It replaced an existing rule that was, itself concerned with the reliability of evidence with a new rule that was also concerned with reliability (albeit only as a procedural guarantee, rather than substantive). And unlike *Gideon*, *Crawford* did not announce the *creation* of a new fundamental right *ex nihilo*:

> The *Crawford* rule simply does not approach this magnitude. It did not establish *ex nihilo* the right to confrontation, as *Gideon* established the right to counsel; it merely reshaped the contours of that right. The difference between the pre-*Crawford* regime of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980)...and the new regime...is small in comparison to the difference between giving a defendant competent counsel and giving him none at all.

JA 215 (O'Scannlain, J., dissenting).

The right to confront pre-existed *Crawford*, whereas the right to counsel in State prosecutions did not pre-exist *Gideon*. The difference is important. In renegotiating and reshaping the boundaries between admissible and inadmissible evidence, this Court in *Crawford* did not create a new fundamental right as it had in *Gideon*, but reworked the operation of an existing one. In shifting the locus of reliability determinations from judges to juries within the narrow confines of testimonial hearsay evidence, *Crawford* merely "reshaped the contours" of the long-established and pre-existing right to confrontation. JA 215 (O'Scannlain, J., dissenting).

Further distinguishing the *Crawford* rule from *Gideon* is the former's amenability to harmless error analysis. This Court has held that error arising from violation of the Confrontation Clause is subject to harmless error review. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). *Crawford* cannot be a watershed rule if confrontation violations can be harmless. *Brown*, 381 F.3d at 1226-27; *Murillo*, 402 F.3d at 791; *see also Coleman v. United States*, 329 F.3d 77, 89-90 (2d Cir.), *cert. denied*, 540 U.S. 1061

(2003) ("it would be anomalous to say, on the one hand, that *Apprendi* errors are not 'structural'—i.e., that they do not inherently deprive defendants of 'basic protections,' or 'substantial rights' —and then to say, on the other hand, that *Apprendi* announced a 'watershed' rule of criminal procedure") (citations omitted); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir.), *cert. denied*, 537 U.S. 1098 (2002). Nothing in *Crawford* suggests otherwise. By contrast, just as *Gideon* is the paradigm of a watershed rule, so too is a *Gideon* violation the paradigm of structural error as to which the harmless error doctrine does not apply. *See*, *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

Finally, to be properly characterized as a rule that alters the understanding of bedrock procedural elements, a new rule must be "sweeping" in its application. *Beard*, 542 U.S., at 418; *see also*, *Sawyer*, 497 U.S. at 241-242. When compared to *Gideon*, *Crawford* is not a sweeping rule. *Crawford* is concerned only with the narrow subject matter of "testimonial statements." *Davis*, 126 S.Ct. at 2274. Much hearsay evidence that would have fallen under the protection of *Roberts*—non-testimonial hearsay—is no longer considered even implicated by Confrontation Clause protections. While the *Roberts* rule itself was narrow in that it was concerned only with hearsay statements, *Crawford* substantially narrowed the breadth of the protections offered by the Confrontation Clause as defined by *Roberts* even further by limiting those protections to testimonial evidence. Under *Crawford* (as elaborated on in *Davis*) an entire category of evidence that was inadmissible under *Roberts*—non-testimonial hearsay evidence not shown to be reliable—is now not inadmissible (that is, it is outside of the parameters of the Confrontation Clause). Because the already narrow confrontation rule of *Roberts* has been further narrowed in its scope and breadth by *Crawford*, it cannot be said that the new

rule of *Crawford* is sweeping in the sense that *Gideon* is, a rule that applies to *all* defendants in *all* serious cases.

b. This Court's many precedents rejecting the characterization of new rules as watershed demonstrate that the new rule of *Crawford* is not a bedrock rule. The Court's *Teague* decisions show that many important new rules, many focusing on increased accuracy and of much greater breadth and scope than *Crawford*, have been held to be non-retroactive.

Although it has had more than a dozen opportunities to analyze whether new rules were watershed rules under *Teague*, the Court has never held that a new rule was so sweeping and fundamental as to have attained this very unique status. *Teague* itself, for example, declined to apply retroactively the new rule of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson*, of course, protects criminal defendants against the discriminatory use of peremptory challenges. There is nothing "mere" in *Batson*, yet it was not applied retroactively.

Beyond *Teague*, the Court decided against retroactivity in every case where retroactivity was at issue. *See, e.g. Butler v. McKellar*, 494 U.S. 407 (1990) (declining to apply retroactively the new rule of *Arizona v. Roberson*, 486 U.S. 675 (1988) concerning post-invocation questioning); *Saffle v. Parks*, 494 U.S. 484 (1990) (declining to apply retroactively the proposed new rule forbidding anti-sympathy instruction); *Goeke v. Branch*, 514 U.S. 115 (1995) (declining to apply retroactively the proposed new rule disallowing the dismissal of an appeal for the failure of a defendant to appear for sentencing); *Gray v. Netherland*, 518 U.S. 152 (1996) (declining to apply retroactively the proposed new rule concerning notice of evidence for defendant); *Graham v.*

Collins, 506 U.S. 461 (1993) (declining to apply retroactively proposed new rule overturning Texas special issue regime on grounds that sentencers could not give effect to offered mitigating evidence); *Gilmore v. Taylor*, 508 U.S. 333 (1993) (declining to apply retroactively rule announced in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990) requiring instruction on "mitigating mental state"); *Caspari v. Bohlen*, 510 U.S. 383 (1994) (declining to apply retroactively proposed new double jeopardy rule); *Sawyer v. Smith*, 497 U.S. 227 (1990) (declining to apply retroactively the new rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) forbidding jury to be misled about its sentencing responsibility); *Beard v. Banks*, 542 U.S. 406 (2004) (declining to apply retroactively the new rule of *Mills v. Maryland*, 486 U.S. 367 (1988) regarding non-unanimity of jurors in finding mitigating factors; *O'Dell v. Netherland*, 521 U.S. 151 (1997) (declining to apply retroactively the new rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994) regarding jury's correct understanding of defendant's future custody status when considering future dangerousness aggravator); *Lambrix v. Singletary*, 520 U.S. 518 (1997) (declining to apply retroactively the new rule of *Espinoza v. Florida*, 505 U.S. 1079 (1992) regarding jury/judge weighing of invalid aggravators); *Schriro v. Summerlin*, 542 U.S. 348 (2004) (declining to apply retroactively the new rule of *Ring v. Arizona*, 536 U.S. 584 (2002) forbidding sentencing factfinding by judges).

Each of the new rules found by this Court to be non-retroactive was important, and each was premised on, and closely related to, an important or fundamental right of criminal defendants. Yet none passed the *Teague* test. These results are not surprising. That a new rule relates to an important or fundamental right does not make the new rule itself fundamental. This conclusion has been implicit, if not

explicit, in all of these decisions. The Ninth Circuit simply misfocused its analysis.

Among the Court's decisions holding against retroactive application of new rules, three decisions—*Sawyer*, *Summerlin*, and *O'Dell*—are especially instructive in illustrating the error of the Ninth Circuit in holding for the retroactivity of *Crawford*. Each of these cases declined to apply new constitutional rules retroactively when those new rules were designed to improve the fairness, accuracy, and reliability in the criminal process, and were premised on a fundamental right. These decisions demonstrate that a decision is not a watershed decision simply because it has some effect on accuracy, or because it is fundamental in some abstract sense.

In *Sawyer*, the Court declined to retroactively apply the *Caldwell* rule. *Caldwell* held that it was constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's sentence rested elsewhere. *Caldwell*, 472 U.S. at 328-29. The Court held that the decision in that case was premised on the need for fairness, reliability and accuracy in the capital sentencing process, and the need to avoid bias against the defendant. *Id.* at 330. The Court further found that bias against a capital defendant would emerge from the fact that juries would believe that they could freely err in their decision because the error would be corrected on appeal. *Id.*, at 331.

In spite of the *Caldwell* rule's explicit focus on accuracy, reliability, and fairness, the Court in *Sawyer* found the new rule to be important but not watershed; the improvement over existing law that protected the same underlying fundamental right was insufficient:

> The *Caldwell* rule was designed as an *enhancement of the accuracy* of capital sentencing, a protection of systemic value for state and federal courts charged with reviewing capital proceedings. But given that it was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systematic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness'.

Sawyer, 497 U.S., at 244 (emphasis added).

Likewise, the Court held in *O'Dell* that the new rule of *Simmons v. South Carolina* was not retroactive. *O'Dell*, 521 U.S. at 167-68. In *Simmons*, the Court held that, in the sentencing phase of a capital case, when the State argues for future dangerousness, and state law forbids parole, the Due Process Clause requires that the trial court instruct the jury that the defendant is parole ineligible. *Simmons*, 512 U.S. at 168-69. The decision was premised on concerns of fairness and accuracy, in that not informing the jury about the defendant's parole ineligibility creates a real possibility that the jury will sentence the defendant on the false belief that he will be released if he is sentenced to life, creating a "false choice". Allowing a capital jury to sentence a defendant based on a misperception of fact or law creates a situation where the defendant could be executed without having had an opportunity to explain or deny the information. *Simmons*, 512 U.S. at 161. Citing *Gardner v. Florida*, 430 U.S. 349 (1977), the Court held that the practice of sentencing a defendant to death under false assumptions by the jury violated "fundamental notions of due process." *Simmons*, 512 U.S. at 164. It is noteworthy that, in *Simmons*, by arguing that the defendant would be a future danger to society if not executed, the prosecutor implied that the defendant would actually be released, a false fact under South Carolina

law. Yet in *O'Dell*, the Court held that the *Simmons* rule was not on par with *Gideon* because the new rule was narrow, applying to a limited number of cases, in distinction to *Gideon's* broad and sweeping application to all felony cases, and because it did not alter the understanding of the bedrock procedural elements essential to the fairness of the proceeding. *O'Dell*, 521 U.S. at 167.

In *Schriro v. Summerlin*, the Court held that the new rule of *Ring v. Arizona*, 536 U.S. 584 (2002) was not retroactive. In *Ring*, the Court held that juries, and not judges, must make capital sentencing decisions. *Ring*, 536 U.S. at 606-609. Finding an irreconcilable tension between *Walton v. Arizona*, 497 U.S. 639 (1990) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that failing to extend the Sixth Amendment right to a trial by jury to capital sentencing proceedings would senselessly diminish that right, since *Apprendi* negated the distinction between elements of a crime and capital sentencing factors. *Ring*, 536 U.S. at 604-05, 609.

After the Ninth Circuit held that *Ring* was retroactive, this Court reversed in *Summerlin*. The Court held that the new rule of *Ring* failed to meet either prong of the *Teague* second exception. The Court held that the accuracy prong did not depend on whether the founding fathers believed juries were more accurate factfinders than judges, or whether juries actually are more accurate; the only issue was whether judicial factfinding so seriously diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach. *Summerlin*, 536 U.S. at 355-56. The Court found that the evidence that juries were more accurate factfinders was "simply too equivocal" to accept; "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Summerlin*, 536 U.S. at

356. Citing *DeStefano v. Woods*, 392 U.S. 631 (1968), a pre-*Teague* case which the Court brought into the post-*Teague* context by finding it to be "germane", the Court found that while the right to trial by jury in *Duncan v. Louisiana*, 391 U.S. 145 (1968), held to be non-retroactive in *DeStefano*, was designed to prevent arbitrariness and repression, the pre-*Duncan* regime was not so unfair or inaccurate as to require retroactivity. *Summerlin*, 542 U.S. at 357. The Court in *Duncan* held that the right to a jury trial was a fundamental right, a "fundamental principle[ ] of liberty and justice" that was well-established at the time the Constitution was drafted, in existence for several centuries in Anglo-American law, and stood as a bulwark against arbitrariness. *Duncan*, 391 U.S. at 148-151. The Court described the new rule of *Duncan* in language virtually identical to that used to describe the new rule of *Crawford* in its policy and historical foundations. *Duncan*, 391 U.S. at 155-56. *Duncan* was subsequently held to be non-retroactive in *DeStefano*. The *Summerlin* Court concluded that, if an entire trial held without a jury was not impermissibly inaccurate, a trial in which a judge found only aggravating factors also could not be. *Summerlin*, 542 U.S. at 357.

If new rules premised on important and fundamental rights that affect both accuracy and fairness like those analyzed in *Sawyer*, *O'Dell*, *Summerlin*, and *DeStefano* were held to be non-retroactive and, therefore, not on par with the right to counsel in *Gideon*, the new rule of *Crawford*, while important, is, likewise, not a watershed rule.

c. The Ninth Circuit erred in finding that *Crawford* satisfied the high standard for constituting a bedrock rule by applying a faulty standard to this second *Teague* prong for watershed rules. Three specific errors in the rationale of the circuit court can be identified. First, the court found that the

new rule was a bedrock rule because it was not insubstantial. Second, the court found that the new rule was a bedrock rule because the right to confront is a bedrock principle. Third, the court wholly misdefined the concept of bedrock rules, and applied that faulty definition to the question.

The Ninth Circuit first erred in finding that *Crawford* was a bedrock rule because it was not insubstantial. The court commented this "Court's Confrontation Clause jurisprudence in *Crawford* cannot be dismissed as a mere tweak on the admissibility of hearsay. The Supreme Court surely did not conceive of it as such." JA 133 (internal citation omitted). Of course, no court has ever claimed that *Crawford* amounted to a tweaking of existing law. (That is precisely why it established a *new* rule.) But this Court's exceedingly high standard for deciding whether a new rule is a bedrock rule is surely not reflected in the conclusion of the court below that any non-insubstantial new rule attains bedrock status. Amounting to far more than a stylistic characterization, the Ninth Circuit's characterization of the new rule as one that is bedrock because it amounted to more than a tweak of existing law misstated the correct standard, and lowered that standard for the bedrock prong of the watershed rule test.

Second, the Ninth Circuit erred in equating the new rule with the underlying right. This error is evidenced by the court's clear confusion as to the distinction between the two: "That the *Crawford* requirement is fundamental to our legal regime is beyond dispute. Justice Scalia's eloquent recitation of the history, purpose, and place of the Confrontation Clause and cross-examination answers this question." JA 126. As set forth above, much of Ninth Circuit's opinion is devoted to an analysis of the importance of the right to confrontation *generally*. *See, e.g.*, JA 128, 132 ("Recognizing that bedrock procedural rules are very few in number, it is no leap to

conclude that the right of cross-examination as an adjunct to the constitutional right of confrontation joins the very limited company of *Gideon*."). The circuit court was correct in its observation that the right to confront is fundamental. The court erred, however, in incorrectly assuming that the fundamental nature of an underlying right automatically translates into a conclusion that a new rule *premised on that right* is also sufficiently fundamental, and sufficiently accuracy-enhancing, to achieve watershed status. This Court has never so held. As set forth above in analyzing this Court's *Teague*-based decisions, it is clear that the Court has never countenanced this artificial conflation, as all of this Court's new rules since *Teague* have, in some manner, implicated fundamental rights, and yet none has been held to be retroactive. As the Tenth Circuit has noted: "Not every holding that draws on a wellspring rule is itself a wellspring holding." *Johnson v. McKune*, 288 F.3d 1187, 1199 (10th Cir.), *cert. denied*, 537 U.S. 1050 (2002) (citations omitted). Having used virtually the same eloquence to describe the history, purpose, and place of the right to a jury trial in *Duncan* as it did to describe the right to confront in *Crawford*, this Court went on to find that new rule non-retroactive.

In piggybacking the new rule of *Crawford* onto the much broader underlying right to confront *generally*, the Ninth Circuit erroneously shifted its analytical focus away from the sole relevant question—whether the new rule itself is a watershed rule. While the right to confront, in general, may be a fundamental right, the much narrower new rule of *Crawford*, focused as it is on a narrow, specific circumstance—the admissibility of testimonial hearsay—is not co-extensive with that right, and is not a watershed rule. In fact, each of the new rules found by this Court since *Teague* to be nonretroactive has implicated a fundamental right in some way. That a new rule relates to a fundamental right, as

argued by the Ninth Circuit, is clearly insufficient to bestow watershed status on that rule.

The Ninth Circuit's third error was incorrectly defining the bedrock prong in terms of the accuracy prong, in effect deleting the former from the standard as a distinct element. This deletion is evidenced in the court's statement:

> The Tenth Circuit mistakenly concluded that rules of constitutional law subject to harmless error review can never be considered bedrock rules of procedure. The two inquiries hinge on different questions. *Whether a rule is a bedrock rule of procedure depends on whether it increases the likelihood of accurate conviction*. Summerlin, ___ U.S. at ___, 124 S.Ct. at 2523. Whether a rule is subject to harmless error analysis depends on whether the impact of the error can be measured. See *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)

JA 134.

This conclusion fundamentally misconceives the conceptual foundations of bedrock rules by defining that prong of the watershed rule standard in terms of the other prong—accuracy. By erroneously defining the first *Teague* prong in terms of the second, the circuit court omitted the bedrock requirement from the standard entirely, and erroneously reduced the two prongs into the accuracy prong. This Court has never countenanced this analytical strategy, and, as set forth above, explicitly rejected it in *Sawyer*.

Thereafter, the circuit court weakened the standard even further by characterizing the accuracy element incorrectly, omitting the requirement that the new rule must *substantially*

increase accuracy. While the majority goes to some length to explain the benefits of confrontation and cross examination *in general* ("purpose of the Confrontation Clause is to promote accuracy", JA 128) the panel did not engage in a comparative analysis of the operation of the old rule with that of the new rule within the context of the operation of those rules. The dissent reminded the majority of these shortcomings:

> Thus, the question is not whether testimony that has been subject to cross examination is more likely to be reliable than testimony that has not. Rather, the question is whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is "one without which the likelihood of an accurate conviction is *seriously* diminished.' *Summerlin*, ___ U.S. ___, 124 S.Ct. at 2523 (internal quotation marks omitted).

JA 149-50 (Wallace, J., dissenting).

The *Crawford* rule, narrow in scope and which renegotiated the contours of an existing right, is neither one without which the likelihood of an accurate conviction is seriously diminished, nor one that alters our understanding of the bedrock procedural elements essential to the fairness of the proceeding. The Ninth Circuit reached erroneous conclusions about both of the prongs of the standard for *Teague's* watershed exception by applying an erroneous, watered-down, and misdefined standard for both prongs. This Court's retroactivity decisions since *Teague* demonstrate that the new rule of Crawford does not approach the *Gideon* benchmark for watershed rules.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT § 2254(D) ADOPTED THE *TEAGUE* EXCEPTIONS.

In addition to finding that *Crawford* should be applied retroactively, the Ninth Circuit in *Bockting I*, held that the Antiterrorism and Effective Death Penalty Act ("A.E.D.P.A"), specifically 28 U.S.C. § 2254(d)(1) and (2), adopted the *Teague* exceptions to retroactivity. The circuit court held:

> The Supreme Court has yet to address directly whether AEDPA was intended or should be read to adopt the *Teague* exceptions. *Williams v. Taylor*, 529 U.S. 362, 380, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000) (Stevens, J., for four justices) ("AEDPA codifies *Teag e* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.") Application of *Teague* is the means by which new rules are made retroactive. As noted earlier, the Court has clarified that the *Teague* and AEDPA inquiries are separate. *Horn*, 536 U.S. at 272, 122 S.Ct. 2147. But in directing us to undertake both inquiries in an AEDPA case, the Court has impliedly endorsed the application of *Teague* in the AEDPA context.

JA 135.

In finding that § 2254(d) adopted the *Teague* exceptions, the Ninth Circuit erred, as this holding misinterprets the clear language of the statute, as well as previous suggestions by this Court that the *Teague* exceptions were not adopted into the statute. It is unmistakable that there is an inherent tension in the logic of the circuit court. On the one hand, the court held

that the Nevada Supreme Court could not know of the future new rule of *Crawford* when it reheard the direct appeal after remand from this Court in 1993: "As we now know, but the Nevada Supreme Court *could not have divined*, *Crawford* dictates the right to cross-examine the witness." JA 136. (emphasis added). This observation is logical since, by their very definition, new rules are not amenable to prediction. On the other hand, the court held that the Nevada Supreme Court's 1993 decision was contrary to *established* Supreme Court precedent in *Crawford*. *Id.*

28 U.S.C. § 2254 (d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The 1996 A.E.D.P.A. amendments fundamentally changed the landscape of federal habeas corpus practice. This Court has recognized that one purpose of the A.E.D.P.A. amendments was to "circumscribe[]" the ability of a federal court to review a State court's habeas decision. *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003). This overriding

Congressional policy must be kept in mind when construing the A.E.D.P.A. statutes.

In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O'Connor wrote for the majority in part II of the opinion. Justice O'Connor noted that one specific congressional goal in passing the A.E.D.P.A. amendments in 1996, and especially 28 U.S.C. § 2254 (d) (1) and (2) was to change the then-existing habeas regime. She further stated that: "It cannot be disputed that Congress viewed § 2254 (d) (1) as an important means by which its goals for habeas reform would be achieved." *Williams*, 529 U.S. at 404. The Court then proceeded to find that the language of § 2254 (d) (1) must be construed, according to "cardinal principle[s] of statutory construction" in a manner that "give[s] effect, if possible, to every clause and word of a statute." *Id.*, at 404. The discussion that follows focuses on the statutes' "contrary to clearly established Federal law" and "an unreasonable application of...clearly established Federal law" clauses. The Court's effort to clarify how these terms should be interpreted gives great insight into how the intimately related statutory language "clearly established Federal law" itself should be read. In recognizing that one purpose of these statutes was to change the existing operation of federal habeas review of State court judgments, and in holding that these statutes must be interpreted according to a common sense reading of the words themselves, the Court provided insight as to the interpretation of the meaning of the term "clearly established Federal law", and the means by which this language ought to be interpreted. In defining the term "contrary", Justice O'Connor turned to its common dictionary meaning. Applying that same strategy to define the related term "established" reveals that the term means to make firm, to institute, or to bring into existence. Webster's New Collegiate Dictionary (1979). This text, therefore, suggests,

along with the recognized purpose of the A.E.D.P.A. amendments to effect change in the operation of habeas review, that under § 2254 (d) (1), congress did not intend to adopt the *Teague* exceptions into the "clearly established Federal law" language, and that the Ninth Circuit's contrary decision was erroneous. Under the plain meaning of the terms as set forth by Congress, habeas corpus relief cannot be granted unless a State court decision is contrary to, that is "diametrically different" from, law that exists at the time the State court decision is made. It is instructive that Congress used the term "established" in the past tense as a participle, rather than using the term "established or to be established", which would have suggested an intent to include the *Teague* exceptions. That Congress specifically used the term "established" in the past tense indicates the intent to measure the correctness of a State court's decision against *existing* law, rather than future law that the State court could, in no way, "divine[ ]". JA 136. While it may be true that Congress can codify existing decisional law, this Court has already recognized that the core purpose of the A.E.D.P.A. amendments, including § 2254, was to effect change in habeas practice, rather than merely to codify existing law. Just as Congress intended to limit the reach of federal habeas corpus to instances where a state court decision is contrary to federal law as determined by this Court, rather than circuit law, the language set forth above indicates a similar intent to limit the reach of the habeas remedy to instances where law is clearly established at the time the state court decision is made. This Court's language set forth above clearly suggests that a rule cannot be both new and clearly established at the same time, and that these conceptual categories are mutually exclusive. The Ninth Circuit's *Bockting* decision is an excellent case in point in demonstrating the exclusivity of these principles—that a 2004 decision of this Court can control a decision of the

Nevada Supreme Court made in 1993 after remand from this Court.

There is no evidence in the language of the statute, or this Court's decisions on the meaning of the term "clearly established Federal law" to support the Ninth Circuit's holding that the statute adopts *Teague's* exceptions. Moreover, the palpable tension in the circuit court's conclusion that a new rule established in 2004 was "clearly established" in 1993 is inescapable. The outcome of such a reading of the statute would be an illogical reading of the words of the statute. This Court has held that it is the "natural reading" of the words themselves within a statutory text that generally controls. *Dodd v. United States*, 545 U.S. 353, 125 S.Ct. 2478, 2482 (2005).

This Court has expressly defined the term "clearly established Federal law" within an unambiguously specific temporal context: in determining the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" in § 2254 (d)(1), the Court has explained that the statute meant no more than it expressly commanded. The Court stated:

> Section 2254(d)(1)'s clearly established phrase refers to the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). In other words, clearly established Federal law under §2254 (d)(1) is the governing legal principle or principles set forth by the Supreme Court *at the time the state court renders its decision*. See id., at 405, 413, 120 S.Ct. 1495; *Bell v. Cone*, 535 U.S. 685, 698, 122 S.Ct. 1843, 152 L.Ed. 2d 914 (2002). In most situations,

> the task of determining what we have clearly established will be straightforward.

Andrade, 538 U.S. at 71-72 (internal quotations omitted) (emphasis added). The plain language of the statute and this Court's words in *Andrade* are dispositive. A.E.D.P.A. was intended to change the law to require that habeas relief cannot be granted unless the State court decision was contrary to this Court's decisions at the time the State court decision was made.

In its ruling below where it read into this statute words that Congress did not set forth, and declared an expanded interpretation clearly at odds with this Court's unambiguous holding in *Andrade*, the Ninth Circuit clearly violated the foundational principle of statutory construction that courts cannot add words to a Congressional enactment. Recently, in construing another A.E.D.P.A. provision relevant to the issue of retroactivity, this Court held that the words of the statute must control:

> [W]e are not free to rewrite the statute that Congress has enacted. '[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' *Tyler v. Cain*, 533 U.S. 656, 663, n.5, 121 S.Ct. 2478, 150 L.Ed. 2d 632 (2001) ("[E]ven if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds').

Dodd, 545 U.S. 353, 125 S.Ct. at 2483 (2005).

Because this Court has defined the phrase "clearly established Federal law" to mean decisions of the Court *"as of the time of the relevant state-court decision"*, the Ninth Circuit, in its AE.D.P.A. analysis, erred in holding that the A.E.D.P.A. amendments codified the *Teague* exceptions. Moreover, the Ninth Circuit's mistaken conflation of the statute with *Teague* conflicts with this Court's command that the phrase "clearly established Federal law" bears only a *slight connection* to our *Teague* jurisprudence", while placing new constraints on the power of federal courts to grant State inmates' habeas applications. *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., concurring in part) (emphasis added). *See*, *Ramdass v. Angelone*, 187 F.3d 396, 406 (4th Cir. 1999); *Murillo*, 402 F.3d at 789.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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